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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-265

NOLAN ESTES, ET AL,
Petitioners,

versus

EDDIE MITCHELL TASBY, ET AL,
Respondents.

SUPPLEMENTAL BRIEF AMENDING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Subsequent to the filing of the Petition for Writ of Certiorari and Application for Stay (No. A-146) by Petitioners, the Respondents in their Opposition to Application for Stay drew into question the constitutionality of an Act of Congress affecting the public interest as follows: (p. 4)

> "Moreover, assuming *arguendo* that section 1757 somehow requires a stay of the Court of Appeals' reversal of the trial court, it is clear that an Act of Congress must give way to the

United States Constitution and construction by this Court of that document."

Petitioners recognize that within the meaning of 28 U.S.C. Section 2403 the question of the constitutionality of an Act of Congress affecting the public interest may be raised by any party. *International Ladies' Garment Workers Union v. Donnelly Garment Company*, 304 U.S. 243, 249. However, in their Opposition to Application for Stay, Respondents did not recite that 28 U.S.C. Section 2403 may be applicable and did not state in their Proof of Service that Respondents' Opposition to Application for Stay had been served upon the Solicitor General, Department of Justice, Washington, D.C., 20530, as required by Rule 33 (2)(b).

In order to make sure conformity by some party with the requirements of Rule 33 (2) (b) and in compliance therewith, the Petition for Certiorari filed herein seeking review of the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on July 23, 1975, is amended to add the following statement:

"STATEMENT UNDER RULE 33 (2) (b)

"Since the proceeding draws into question the constitutionality of Section 258 of the Equal Educational Opportunities Act of 1974, Pub. L. 93-380, Title II, Sec. 258, Aug. 21, 1974, 88 Stat. 520, 20 U.S.C. Section 1757, an Act of Congress affecting the public interest, and neither the United States nor any agency, officer or employee thereof is a party, it is noted that 28 U.S.C. Section 2403 may be applicable.

"No court of the United States as defined by 28 U.S.C. Section 451 has, pursuant to 28 U.S.C. Section 2403, certified to the Attorney General the fact that the constitutionality of such Act of Congress has been drawn in question."

ADDITIONAL REASON FOR GRANTING THE WRIT

Review of the opinion-mandate of the Court of Appeals is required for a far more important reason than the numbers of children to be transported in the Dallas Independent School District to achieve a unitary school system. The Court of Appeals mandates an order of the District Court requiring transportation of students from one school to another, at the start of the second semester of the 1975-76 school year. The Equal Educational Opportunities Act of 1974 prohibits any order requiring student transportation at the start of the second semester of the 1975-76 school year.

When any "inferior tribunal" created by Congress can violate and ignore — without so much as a passing reference — an Act of Congress expressly restricting that Court's power to make the order in question, then the will of the people through Congress is thwarted and our constitutional government, including the separation of powers, will exist no more.

The fact that the Court of Appeals has completely ignored an Act of Congress limiting its powers suggests enormous opportunities for any judicial officer to rule at his whim without limitation. This nation's great

and unique form of constitutional government would be seriously impaired if Congress, having created a "court" under the Constitution, can impose no limitations or restrictions on the power, authority or jurisdiction of a court so created.

No question is here presented as to the power of the courts to consider and declare a statute enacted by Congress repugnant to the Constitution. This was not done by the Court of Appeals. Here, it did not even bother to declare Section 258 of the Equal Educational Opportunities Act of 1974 unconstitutional, but simply attempted to make that congressional enactment disappear by ignoring and disregarding a valid provision of the supreme law of the land limiting the power of that Court. Laws made by Congress pursuant to the Constitution are a part of the supreme law of the land. (See Article VI, Constitution, *Marbury v. Madison*, 1 Cranch 137, 179, 2 L.Ed. 135, 178.) But the Constitution does *not* provide that a decision of the Court of Appeals is the supreme law of the land. Rather all United States Courts other than the Supreme Court are "inferior courts as the Congress may from time to time ordain and establish". Constitution Article III, Section 1.

Consider how destructive to our form of government is the act of the Court of Appeals in ignoring this congressional legislation. In the area of school desegregation the public is constantly reminded that this is a nation of laws and not of men and that this republic cannot long endure if the orders of courts are not obeyed by all citizens regardless of their own opinions and regardless of the effect upon their daily lives.

Indeed, at this very time in the City of Dallas responsible citizens are urging this very proposition.

No citizen should be permitted to ignore the law and throw a brick at what that citizen considers to be an unacceptable school bus. No court should be permitted to ignore the law and order a student transported at a time prohibited by law — absent a judicial construction that such law is invalid. No organized society of men can exist without some concept of obedience to law. But when courts, as did the Court of Appeals, completely ignore the law as enacted by Congress and then proceed to violate that law, and there is no redress, then the people of this country are not encouraged to obey the law — or the courts.

CONCLUSION

For the reasons stated herein and in the Petition, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioners

September, 1975

PROOF OF SERVICE

We, Warren Whitham and Mark Martin, Attorneys for Petitioners herein, and members of the Bar of the Supreme Court of the United States, hereby certify that on the 18th day of September, 1975, we served three copies of the foregoing Supplemental Brief Amending Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit upon the following Counsel for Respondents:

Mr. Edward B. Cloutman, III
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and upon the following Counsel for the various intervenors:

Mr. Robert H. Mow, Jr.
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and to the following intervenor pro se:

Mr. James T. Maxwell
4440 Sigma Road, Suite 112
Dallas, Texas 75240

and upon:

The Solicitor General
Department of Justice
Washington, D.C. 20530

and hereby certify that on the above mentioned date we also served:

1. Three copies of the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit,

2. One copy of Petitioners' Application for Stay of Opinion-Mandate in No. A-146, and

3. One copy of Respondents' Opposition to Application for Stay of Opinion-Mandate in No. A-146,

upon the Solicitor General, Department of Justice, Washington, D.C. 20530, by mailing same to such Counsel at their respective addresses and depositing the same in a United States mail box in an envelope properly addressed to such addresses with first class air mail postage prepaid.

We further certify that all parties required to be served have been served.

_____

WARREN WHITHAM

_____

MARK MARTIN

Attorneys for Petitioners